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NO. 87215-5

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, OFFICE OF THE INSURANCE
COMMISSIONER,

Petitioner,

v.

CHICAGO TITLE INSURANCE COMPANY,

Respondent.

**REPLY TO CHICAGO TITLE'S ANSWER TO THE INSURANCE
COMMISSIONER'S PETITION FOR REVIEW**

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ORIGINAL

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I. INTRODUCTION

In its Answer to the Petition for Review (“Answer”), Chicago Title Insurance Company (“Chicago Title”) raises two new issues for review. This is the Insurance Commissioner’s reply to those two new issues.

II. NEW ISSUES RAISED

- A. The Legislature delegated authority to the Insurance Commissioner to define unfair trade practices in the business of insurance, and placed adequate procedural safeguards on that authority. Former WAC 284-30-800¹ is a rule properly promulgated under the delegated authority and procedural safeguards found in RCW 48.30.010. Did Chicago Title fail to demonstrate that its claim of “adjudicative rulemaking” raises a significant question under the Washington State Constitution, where the Commissioner issued an order against Chicago Title for violating WAC 284-30-800?
- B. WAC 284-30-800 prohibits title insurers from “directly or indirectly” offering illegal inducements. Did Chicago Title fail to demonstrate that its claim of “adjudicative rulemaking” raises a significant issue of public interest, where the Commissioner issued an order against Chicago Title for indirectly offering an inducement through its agent, Land Title, in violation of WAC 284-30-800?

¹ As noted in the Petition, WAC 284-30-800 was repealed after being codified in RCW 48.29.210. However, the language in the new statute prohibiting “direct or indirect” inducements mirrors the language of WAC 284-30-800, which the Court of Appeals did not include in its analysis.

III. ARGUMENT WHY CHICAGO TITLE'S ADDITIONAL GROUNDS FOR REVIEW SHOULD BE REJECTED

For purposes of this Reply, there are two critical and undisputed facts relevant to whether this Court should accept review of two additional issues raised by Chicago Title. First, former WAC 284-30-800 was properly adopted under the statutory rulemaking procedures laid out in RCW 48.30.010 and RCW 34.05.310-.395, and pursuant to the constitutionally delegated rulemaking authority the Legislature granted to the Commissioner in RCW 48.30.010(2). Chicago Title has not argued, or pointed to any evidence, that the Legislature's delegation of authority was unconstitutional, or that WAC 284-30-800 was not properly adopted. Second, the record is clear that the Commissioner charged Chicago Title with violating the plain language of WAC 284-30-800, when Chicago Title, through its agent, Land Title, indirectly paid illegal inducements. Petition for Review, App. at 126. Although the Commissioner disputes many of the "facts" alleged in the Statement of Facts in Chicago Title's Answer, none of the "facts" contained in the Answer are relevant to the two new issues raised by Chicago Title.

Chicago Title failed to identify any decision by a Court of Appeals or the Supreme Court that is in conflict with any part of the Court of Appeals' decision regarding the new issues Chicago Title raised in its

answer. *See* RAP 13.4(b)(1)-(2). Chicago Title failed to provide evidence or argument to support how its two additional grounds for review satisfy the remaining grounds for review established in RAP 13.4(b). Chicago Title's two issues alleging rulemaking through adjudication therefore do not merit this Court's review.

A. Enforcement Of A Properly Promulgated Rule, Pursuant To Constitutionally Delegated Authority, Is Not A "Significant Question Of Law Under The Constitution Of The State Of Washington".

The Legislature may, consistent with the State Constitution, delegate rulemaking authority to agencies if:

(1) the legislature has set forth guidelines defining in general terms what is to be done and what administrative body or officer is to do it, and (2) adequate procedural safeguards exist to control arbitrary administrative action and the abuse of discretionary power....

Barry & Barry, Inc., v. Dep't of Motor Vehicles, 81 Wn.2d 155, 164, 500 P.2d 540 (1972). In this case, the Legislature delegated broad authority to the Insurance Commissioner to promulgate rules defining unfair or deceptive trade practices in the business of insurance. RCW 48.30.010(2). The rule Chicago Title is charged with violating - WAC 284-30-800 - is such a rule. The Commissioner properly adopted WAC 284-30-800 following the statutory notice and comment procedures set forth in RCW 48.30.010 and RCW 34.05.310-.395; Chicago Title never argued or offered evidence to the contrary. Thus, it is within the Commissioner's

constitutionally delegated authority to prohibit indirect illegal inducements, as he has done in WAC 284-30-800.

While Chicago Title accused the Commissioner of adjudicative rulemaking in violation of the State Constitution, Chicago Title has not cited any constitutional provision or other legal authority to support its theory. Mere mention of the State Constitution is not sufficient to demonstrate a constitutional issue. Moreover, Chicago Title has not made any argument as to why the alleged constitutional issue is significant. Chicago Title's fleeting reference to its Court of Appeals brief is not sufficient to demonstrate a significant constitutional question relating to the Legislature's delegation of rulemaking authority. Therefore, Chicago Title failed to identify a "significant question of law under the Constitution of the State of Washington". See RAP 13.4(b)(3).

B. Disagreement With The Commissioner's Interpretation Of A Properly Adopted Rule Is Not A Significant Issue Of Public Interest.

WAC 284-30-800 states that title insurers may not indirectly pay illegal inducements:

It is an unfair method of competition and an unfair and deceptive act or practice for a *title insurer* or its agent, *directly or indirectly*, to offer, promise, allow, give, set off, or pay anything of value exceeding twenty five dollars,... to any person as an inducement, payment, or reward for placing or causing title insurance business to be given to the title insurer.

Former WAC 284-30-800(2) (emphasis added). Under this rule, a title insurer commits an unfair practice when it indirectly, through its appointed agent, pays improper inducements to sell title insurance policies – which is exactly what Chicago Title was found to have done in this case.

The Court of Appeals erred when it reversed the Commissioner's Final Order without a complete analysis of the text of WAC 284-30-800. Chicago Title's claim that the Commissioner engaged in improper adjudicative rulemaking makes the same error, by ignoring the plain language of WAC 284-30-800.

At its core, this matter is a disagreement between Chicago Title and the Commissioner over how to interpret WAC 284-30-800. Chicago Title wants the Commissioner, and this Court, to ignore the term “indirectly,” and hold that title insurers may profit from the illegal inducements of their agents, but not be held accountable unless the inducement was “directly” provided by the insurer. But this is not what the Commissioner's rule states.

There is no question that RCW 48.30.010 granted the Commissioner the authority to promulgate WAC 284-30-800, and that this rule, which prohibits title insurers from “directly or indirectly” offering illegal inducements, was promulgated pursuant to statutory rulemaking

procedures. There is also no question that this is the rule Chicago Title was charged with violating. Therefore, Chicago Title has failed to demonstrate that adjudicative rulemaking took place, let alone how the unsupported additional two issues it raised are significant issues of public interest.

IV. CONCLUSION

The Insurance Commissioner's Petition for Review concerns the Court of Appeals failure to analyze and apply former WAC 284-30-800. However, the Court of Appeals properly declined to adopt the unsupported additional grounds for review Chicago Title has raised in its Answer. This Court should do the same. The Commissioner respectfully requests this Court accept review of the issues identified by the Commissioner, and affirm the agency order holding Chicago Title responsible for illegal inducements it made indirectly through its appointed agent.

RESPECTFULLY SUBMITTED this 6th day of June, 2012.

s/ Jean Wilkinson
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STATE OF WASHINGTON, OFFICE
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CHICAGO TITLE INSURANCE
COMPANY,

Respondent.

DECLARATION OF
SERVICE

I declare that I served the Insurance Commissioner's Reply to Chicago Title's Answer to the Insurance Commissioner's Petition for Review and this Declaration of Service on all parties or their counsel of record on the date below as follows:

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///

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of June, 2012, at Olympia, Washington.

s/ Meghan Lehnhoff
MEGHAN LEHNHOFF, Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, June 06, 2012 1:17 PM
To: 'Lehnhoff, Meghan (ATG)'
Cc: DeLeon, Marta (ATG); Wilkinson, Jean (ATG)
Subject: RE: WA ST Ins. Comm. v. Chicago Title

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Subject: WA ST Ins. Comm. v. Chicago Title

RE: State of Washington, Office of the Insurance Commissioner v. Chicago Title Insurance Company

WA Supreme Court No. 87215-5

Dear Clerk:

Attached for filing in the above matter on behalf of Jean Wilkinson and Marta DeLeon are the following documents:

- WA St. Ins. Comm's Reply to Chicago Title's Answer to the Ins. Comm's Petition for Review
- Declaration of Service

<<Declaration-20120606-ServiceOfReplytoCTRsptoPFR.pdf>> <<Reply-20120606-PetitionforReview.pdf>>

Please contact me with any questions or concerns.

Thank you,

Meghan Lehnhoff

Legal Assistant

Gov't Compliance & Enforcement

Office of the Attorney General

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